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No. 63

In the Supreme Court of the United States

OCTOBER TERM, 1937

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

W. V. GRIFFIN AND H. W. PURVIS, RECEIVERS FOR GEORGIA & FLORIDA RAILROAD

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF ON BEHALF OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OCTOBER 1937.

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OPINIONS BELOW

The opinion of the specially-constituted District Court (R. 55) dated February 23, 1937, holding invalid the report and order of the Interstate Commerce Commission upon further hearing (February 4, 1936) (R. 41) is unreported. The Court's earlier opinion in the same case, filed January 23, 1935 (R. 29) holding invalid an earlier report and

order of Division 5, dated May 10, 1933 (R. 5) is likewise unreported.

The order of the Commission upon further hearing, dated February 4, 1936, appears as Docket No. 9200, *Railway Mail Pay—In the Matter of Application of Georgia & Florida Railroad for Increased Rates of Pay,* 214 I. C. C. 66. (R. 41) The earlier report of the Commission, Division 5, dated May 10, 1933, is reported under the same title in 192 I. C. C. 779. (R. 5)

JURISDICTION

The final decree of the District Court was dated February 22, 1937. (R. 58) Petition for appeal was filed April 16, 1937, (R. 304) and allowed the same day (R. 307). The jurisdiction of this Court is founded upon the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 203, 219, 220, (U. S. C., Title 28, Secs. 45 and 47a, Supp. III), and Section 283 of the Judicial Code, as amended by Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, U. S. C., Title 28, Sec. 345.) Probable jurisdiction was noted June 1, 1937.

QUESTIONS PRESENTED

Following a general reexamination by the Commission into the "fair and reasonable rates" to be accorded the railroads generally (other than urban and interurban electric lines) for services performed by them for the Post Office Department, in transporting the mails, the Commission established reasonable rates of pay on all lines, including the

Georgia & Florida Railroad, appellee. The rates so established, effective on August 1, 1928, represented an increase of 15 per cent over the rates formerly in effect for roads over 100 miles in length, and an increase of 80 per cent in the rates on roads not exceeding 100 miles. *Railway Mail Pay,* 144 I. C. C. 675, 719. The Railway Mail Service Pay Act of July 28, 1916, authorized the Commission, in fixing the rates of compensation (U. S. Code, Title 39, Sec. 549) "to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification." After the rates so established have been in effect for at least six months, the statute (section 553) authorizes either the Postmaster General or any carrier to apply for a reexamination of the rates, whereupon the Commission is to hear and consider the application of the individual carrier separately "upon substantially similar proceedings" as in the general investigation. Availing themselves of this right, the receivers of the Georgia & Florida filed an application with the Commission on April 1, 1931 (R. 21) requesting an increase in the rates, alleging that they were not fair and reasonable as to it. After hearing, the Commission, by Division 5, issued a report on May 10, 1933, finding that the rates established August 1, 1928, were fair and reasonable and establishing them as the rates to be received by the carrier on

and after April 1, 1931. *Railway Mail Pay,* 192 I. C. C. 779. (R. 5; 10)

The Georgia & Florida then brought suit to enjoin and annul the order of May 10, 1933, and on January 18, 1935, the lower court rendered its opinion holding in substance that the established rates were less than the cost of the service, and entered its decree enjoining and annulling the order and directing that the Commission take further action. (R. 30) Further hearing was had, and on February 4, 1936, the entire Commission issued a report on further hearing, again finding that the existing rates were fair and reasonable and establishing them as the rates to be received by the Georgia & Florida on and after April 1, 1931. *Railway Mail Pay,* 214 I. C. C. 66. (R. 41; 50) By supplemental bill, (R. 35) the carrier sued to enjoin the order of February 4, 1936, and on February 22, 1937, the court rendered its opinion holding again that the rates were less than fair and reasonable and entered a decree setting aside and annulling the order and once more directing further action by the Commission. (R. 55, 58) The court ruled that the rates fixed were insufficient to produce a proper return. This conclusion of inadequacy in the rates rests upon a so-called "cost study" or estimate of the cost of the service, although the court itself stated that the study was "hypothetical" and not conclusive. (R. 57)

These facts present the question of whether the lower court has not in substance weighed the evi-

dence before the Commission and substituted its judgment for that of the Commission as to the reasonableness of the rates of mail pay.

A subsidiary question, jurisdictional in nature, is whether the special procedure provided by the Urgent Deficiencies Act of October 22, 1913, under which this suit was brought, applies to an order made by the Commission under the Railway Mail Service Pay Act of July 28, 1916 (U. S. Code, title 39, sections 523–568), an Act separate and complete in itself and not an amendment to the Interstate Commerce Act. (Compare *Great Northern Railway* v. *United States*, 277 U. S. 172, 180–182).

STATUTES INVOLVED

Pertinent provisions of the Railway Mail Pay Service Act of July 28, 1916, are set forth in the appendix. But briefly, that Act (Section 541) requires all railway common carriers to transport such mail as may be offered for transportation by the United States under conditions prescribed by the Postmaster General, for which the carrier is to receive "fair and reasonable compensation"; the Interstate Commerce Commission is directed to fix such compensation; in the performance of this duty a wide discretion is left with the Commission, which can prescribe a basis for determining the compensation "by weight, or space, or both, or otherwise", and orders of the Commission fixing the rates are to "continue in force until changed

by the Commission after due notice and hearing." Section 543 of the Act empowers the Commission in fixing rates of mail pay, to consider the relation existing between the railroads as public service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroad; another section, 549, authorizes the Commission to make reasonable classification of the carriers and to fix general rates applicable to all carriers in the same classification, but any individual carrier or the Postmaster General, after the lapse of six months, may apply for a reexamination of the order (Section 553). When the rate of compensation has been fixed by the Commission, the Act (Section 551) provides that during the continuance of the order the Postmaster General is to pay the carrier such rate of compensation. Section 554 vests the Commission with all the powers "which it is now authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers." Penalties are provided by Section 563 for failure on the part of a railroad company to perform the mail service at the rates so fixed.

The Act contains no provision for judicial review of Commission orders fixing compensation; what it does provide, if a carrier is dissatisfied with its rate of pay, is a reexamination into the question

by the Interstate Commerce Commission, after the lapse of a 6-months period under the old rates.

STATEMENT

(a) HISTORY OF RAILWAY MAIL PAY LEGISLATION

Before any railroads were constructed in this country, the Postmaster General was authorized to contract with the lowest bidder for carriage of the mail by post coach. Congress approved a law July 7, 1838, making existing railroads and those to be constructed in the future post routes and directed the Postmaster General to cause the mail to be transported by rail, provided it could be done on reasonable terms and in no event at more than 25 percent above the cost by post coach. At various times thereafter legislation was enacted respecting transportation of the mail by railroad. On March 3, 1873, a law was approved which placed mail pay on a weight basis. Various laws were passed in ensuing years which reduced the rates of mail pay and changed the method of ascertaining the weight of the mail carried. For a considerable period prior to 1916 the weights were determined quadrennially by actually weighing the mail for stated periods.[1] Authorizations were issued by the Post Office Department and accepted by the railroads for carriage of the mail for the following four-year period on the basis of the average weight ascer-

[1] A detailed history of railway mail legislation affecting transportation and pay will be found in *Railway Mail Pay*, 56 I. C. C. 1, 3–7 (1919).

tained during the test period. Maximum rates of pay were prescribed by Congress in the appropriation bills for the Department.

On July 28, 1916, the present Railway Mail Pay Act (30 Stat. 425) was enacted, giving the Commission power to determine rates of pay on either a weight or space basis. In the interim the Postmaster General placed substantially all mail routes, except closed-pouch routes, on a space basis.

The first decision of the Commission dealing with rates for transportation of the mail was *Railway Mail Pay* (56 I. C. C. 1), decided December 23, 1919, which fixed rates on a space basis for all the railroads carrying the mails on the general system of flat rates for the entire country, with higher rates for certain short lines less than 100 miles in length. Thereafter, in July 1925, the Georgia & Florida, and numerous other carriers, requested the Commission to re-examine the rates. This application resulted in the decision of July 10, 1928, in *Railway Mail Pay* (144 I. C. C. 675), whereby the Commission allowed the Georgia & Florida and other roads over 100 miles in length an increase in rates of about 15 per cent over the 1919 rates, and "separately operated" railroads under 100 miles in length an increase of about 80 per cent. These increased rates for carrying the mails, which are the present rates received by the Georgia & Florida Railroad, were based upon findings as to the average cost of transporting the mails on all railroads

throughout the United States, other than electric urban and interurban railroads.

By this decision, the Commission, at the request of the Department, authorized the use of additional space units. Prior thereto, the Department could authorize only 3, 7, and 15-foot closed-pouch space units, 3, 7, 15, and 30-foot storage space units, and 60-foot storage cars, 15 and 30-foot apartment cars, and 60-foot railway post office (r. p. o.) cars. The new authorization provided for 3, 6, 9, 12, and 15-foot closed-pouch units, storage units of 3 feet or multiples thereof up to 30 feet, and 60-foot storage cars, 15 and 30-foot apartment cars, and 60-foot r. p. o. cars. These changes gave the Department more flexibility in ordering space and thereby made savings possible. The rates prescribed were on a mileage basis for application to the space units just described, and were graduated, being relatively highest per foot of car length for the smallest unit and lowest for full cars.

The railroads and the Department presented extensive and conflicting cost studies in the 1928 proceeding, which form the basis of appellee's present rates. While the Commission gave principal consideration to the cost of carrying the mail, including a reasonable return on the value of the property used in furnishing the service, it did not accept either cost study in its entirety. The Commission pointed out why too much reliance could not be placed upon cost studies of this character

(144 I. C. C. 675, 691–692).[2] It considered comparisons of the cost of performing other passenger-train services and also special conditions affecting transportation of the mail.

It may be assumed that the rates prescribed in the 1928 *Mail Pay case* were, when fixed, just and reasonable. To determine whether they still are requires an analysis similar to that made at that time so far as data are available. Ascertainment of the cost to the railroads of carrying the mail requires, first, apportioning total operating expenses between freight and passenger services, and next, assigning and apportioning passenger-train expense among the various services performed, mainly passenger and miscellaneous services, and express and mail service. The value of the property used in rendering mail services must also be ascertained. Efforts to comply with these requirements were made by the parties in this case, and the reports of the Commission (R. 5; 41) review in great detail such evidence.

[2] Had the Commission given controlling weight to the railroads' cost study, an increase of approximately 40 percent for roads over 100 miles in length and from 100 to 150 percent or more for roads 100 miles or less in length would have been required to give what the railroads considered the full cost of service plus a profit of 5.75 percent under plan 2, as described in the Commission's report. (p. 681). Under that plan the Department's cost study showed that an increase of at least 25 percent would be required for roads longer than 100 miles, and about 91 percent for roads 100 miles or less in length.

(b) PROCEEDINGS BEFORE THE COMMISSION AND IN THE DISTRICT COURT

After the Commission's decision in *Railway Mail Pay*, 144 I. C. C. 675, granting an increase of 15 percent in the rates for railroads over 100 miles in length, including the Georgia & Florida, the receivers of that railroad filed an application with the Commission on April 1, 1931 (R. 21) alleging that the increased rates were not fair and reasonable as to it and requesting a further increase. On April 9, 1931, the Postmaster General filed an answer contending that, since the rates applicable to the Georgia & Florida and to other railroads were established from statistical and other data submitted by the railroads, the petition should be denied unless the applicant could show its situation was so different from the other carriers in the group as to be exceptional (R. 23–24). In overruling the Department's claim, the Commission said:

> * * * The applicant, however, under the railway mail-pay statute is entitled to show, if it can, upon reexamination that in so far as it is concerned the rates so established are not fair and reasonable. In determining that issue we must take into consideration all factors that have a bearing upon it.
>
> (R. 8).

In a subsequent Commission hearing, the Department and the carrier introduced testimony and evidence relevant to their respective contentions.

The proceeding was fully argued, both orally and in briefs, and in its decision, the Commission (R. 5) held that the existing rates were fair and reasonable. Upon denial of a petition for rehearing, the carrier instituted suit to enjoin the Commission's order. This order is included in the record. (R. 10.) The claim of invalidity was cast on the theory that the Commission made certain findings allegedly supporting the carrier's claim for increased compensation and then reached ultimate conclusions contrary to those findings; that the action of the Commission in holding the rates attacked had not been shown unreasonable was contrary to the evidence, and that the Commission's prescription of the rates deprived the carrier of just compensation. (R. 3–4).

The United States answered (R. 16), as well as the Commission, (R. 18) the latter setting forth affirmatively a detailed statement of the proceedings and denying the material allegations of the petition.

Final hearing was had before a statutory court, which, on January 23, 1935, held the Commission's order invalid, saying:

> * * * The bald fact remains that this railroad is required in order to escape severe punishment (39 U. S. C. A., Section 563) to transport mail at a compensation fixed by such Commission and that such compensation does not pay the actual cost of service. This compensation is not in compli-

ance with the duty on the United States to pay "fair and reasonable compensation" and is not "just and equitable."

(R. 30.)

In the Court's decree, made a part of the opinion, it is said:

> Inasmuch as this court has not the authority to fix the compensation we do not deal with the question of what per cent. of return on the investment, if any, would be required to make the compensation fair and reasonable.
>
> (R. 30.)

The Court directed that the—

> Commission shall take such further action [3] in the premises as the law requires in view of the annulment and setting aside of the said order of May 10, 1933.
>
> (R. 30).

The Court gave no suggestions as to the nature of the further action it desired the Commission to take nor any directions as to the law to be applied. The entire Commission considered the report of its Division 5 which the Court had annulled and set aside, and the opinion of the Court with respect thereto, and reopened the proceeding for further

[3] Despite the fact that the Commission complied with the court's direction to take "further action" in the premises by conducting a rehearing, the District Court in its second opinion held that because the earlier decision was not appealed to this Court, such previous decision established the law in the case (R. 57).

hearing. (R. 32) At this hearing considerable additional testimony and evidence was introduced by both sides. The testimony taken in the two hearings before the Commission was introduced in the lower court and is before this Court in narrative form (R. 60–127) as are pertinent exhibits. (R. 127–304)

At the conclusion of the second hearing additional briefs were filed and oral arguments made, culminating in the report by the entire Commission on further hearing, entered February 4, 1936, 214 I. C. C. 66. (R. 41–50) Once more the Commission found the existing rates of pay received by the Georgia & Florida for its mail services fair and reasonable. (R. 50)

The Railroad Company by supplemental petition filed June 20, 1936, (R. 35) asked the District Court to

> Adjudge, Order and Decree that the Commission reopen and reconsider said proceeding * * * and determine the fair and reasonable rates to be received by petitioners for transportation of the mails on and after said April 1, 1931, in accordance with the evidence and the facts found by this Court.
>
> (R. 40)

The District Court as before constituted reconsidered the case upon the supplemental pleadings, and by its opinion and decree filed February 23, 1937, (R. 55) held the Commission's order invalid

and once more directed the Commission to "take such further action in the premises as the law requires in view of the annulment and setting aside of said order of February 4, 1936." (R. 58)

It seems clear from the above that the Commission is convinced that the Georgia & Florida is being paid mail compensation that is fair and equitable. It seems equally clear that the District Court, weighing the same evidence upon which the Commission so concluded, is convinced that such rates do not result in just compensation to the carrier. It is interesting to consider whether such shunting of the proceedings between Commission and Court must continue indefinitely until at some time in the future the Commission fixes a rate satisfactory both to the carrier and to the court; if such process can be followed, it would appear that the court is indirectly, but none the less effectively, fixing the rates of mail pay despite its statement that it "has not the authority to fix the compensation." (R. 30)

The second opinion of the District Court is more in the nature of a defensive thesis to justify its first decision, but appears to hold that the rates established by the Commission were not sufficient to produce a proper return, and that in fixing mail rates, the Commission was without authority to make comparisons of the returns produced by the established mail pay rates with returns received by the carrier from other services in passenger train cars or with returns produced by freight rates.

While the lower court did not base its decision upon the inadequacy of the Commission's findings, its comment thereon was:

> For the reason that neither report states definitely "Findings of Fact" as such it is not easy to ascertain what different facts existed at the differet hearings. We will do our best to ascertain the differences in facts and in rules of law following the course of discussion in the last report. (R. 56)

However, when it came to consider its own duty to make findings under Equity Rule 70½, the District Court said:

> Inasmuch as all the facts constituting the basis for the order of the Commission are fully set out in the report it is deemed unnecessary to restate them in this opinion as findings of fact, * * *.
> (R. 58)

ASSIGNMENT OF ERRORS

The following errors of the District Court are urged herein:

1. In holding that the Commission's order was unlawful.

2. In holding and deciding, after stating that "neither applicant nor this Court entertains the view that the hypothetical cost 'is necessarily conclusive' ", that the cost study proved that rates established by the Commission and the return produced by them are not fair and reasonable.

3. In weighing the evidence and in reaching a conclusion different from that of the Commission, thus substituting its judgment for that of the Commission.

4. In failing to hold that the evidence introduced by the carrier, based upon approximations, allocations and computations, lacked sufficient certainty and definiteness to prove that the rates established by the Commission were not fair and reasonable.

5. In holding that its earlier opinion established the law in the case and precluded the Commission from considering comparisons with compensation received for other services. (R. 306–307)

The additional point is urged by appellants that the specially-constituted three-judge District Court had no jurisdiction, under the Urgent Deficiencies Act of October 22, 1913, (38 Stat. 219) to entertain this suit. Appellants did not raise this point below, but as it goes to the jurisdiction of the District Court and hence to the jurisdiction of this Court on appeal, the failure to raise it could not, in our opinion, operate as a waiver.[4] *Peoria & Pekin*

[4] This point was not urged in the court below because the suit brought by the Georgia & Florida was the first under the Urgent Deficiencies Act to review a railway mail pay order of the Commission. There are many other carriers similarly situated to the Georgia & Florida and additional suits will be brought if this litigation warrants. For that reason the Commission desired a decision on the merits as a guide. Compare *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 475. While the Commission would still prefer a decision on the merits, we regard it as our duty to call the Court's attention to the jurisdictional question.

Union Ry. Co. v. *United States,* 263 U. S. 528, 535–536; *United States* v. *Corrick,* 298 U. S. 435.

SUMMARY OF THE ARGUMENT

I. The Urgent Deficiencies Act of October 22, 1913, providing for judicial review of orders of the Commission, is an amendment of the Interstate Commerce Act and "but a part of the existing system for the regulation of interstate commerce." *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, 294–295. Action of the Commission dealing "with a subject matter not within the scope of the Commission's duty to regulate commerce" is not within the purview of that remedy. *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, 182. The duty placed upon the Commission to fix reasonable compensation to rail carriers for services performed by them in transporting the mails is a special duty under the Railway Mail Act, separate in itself, and no part of the existing scheme of regulation. As the carrier is not acting in a common-carrier capacity in transporting the mails (*A., T. & S. Fe Ry. Co.* v. *U. S.,* 225 U. S. 640, 649), a Commission order fixing compensation therefor is not a regulation of commerce, and is not within the purview of remedy provided by the Urgent Deficiencies Act for review of certain Commission orders.

II. The lower court's conclusion, and the argument of appellee, that the rates prescribed by the Commission are not fair and reasonable rests en-

tirely upon the results of a "cost study" during a 28-day test period in 1931. The Commission quite properly refused to accept as conclusive the cost-study figures, and considered a number of other factors, fully detailed in its report, showing how untrustworthy such figures were. The weight to be accorded the cost study, like any other evidence, was for the Commission; in accepting as conclusive the cost study figures, which were treated by the Commission as only an "approximation," the lower court substituted its judgment for that of the Commission upon an administrative matter. In addition to the cost study, the Commission felt constrained to consider such factors as the essential character of the space devoted to the mails, the operating facts connected with it, and the kind and character of the service rendered by appellee in transporting the mails. Such consideration showed that the use actually made of the space requisitioned and paid for by the Government was far below the capacity of the space, the average maximum load carried in the 3-foot units of closed-pouch space, except over one run, ranging from 2 to 20 bags as contrasted with the maximum capacity of 56 bags. A fact that stands out in this proceeding is the small amount of mail actually transported by this carrier. The actual loads carried are a factor to be considered.

The operation by the carrier for its own convenience of a 30-foot railway post-office apartment

unit, in lieu of a 15-foot apartment which was ordered by the Post Office Department and is more than ample to meet its needs, results in the operation of a large amount of unused space and increases the amount of space and the expense apportioned to mail. Such operation is an important factor in this case, and the Commission found that the elimination from the mail of any part of the operation of the 15 feet of unused space in the oversize apartment converts a computed operating deficit from mail of $4,945 to a computed operating income of $1,711.

In all mail pay proceedings the Commission has made comparisons of revenues and expenses upon the bases of common units of service per mile. As indicating liberality on the part of the Commission in fixing rates of mail pay for appellee, comparisons based upon space and cost figures as submitted of record show that in passenger-train service operations in 1931, appellee received $35,728 from mail service for 12.96 per cent of the total car-foot miles of service, $7,593 from express for 6.69 per cent, and $36,322 from passenger proper for 80.35 per cent. In other words, mail revenue from 12.96 per cent of the total car-foot miles operated was 44.86 per cent of the total passenger-train service revenues, express revenue from 6.69 per cent of the car-foot miles was 9.53 percent of the total, and passenger revenue proper from 80.35 per cent of the car-foot miles was 45.61 per cent of the total.

Other evidence of record set out in the Commission's report shows that the carrier's mail revenues have remained quite stable, compared with drastic falling off in revenues from other services. Between 1929 and 1931 revenues from passenger proper service decreased 67 per cent, from express 64 per cent, and from mail 12 per cent. The law provides for rates that are "fair" as well as "reasonable," (Cf. *San Diego Land Co.* v. *Jasper,* 189 U. S. 439, 447) but it does not require that the mail rates be increased so as to take care of deficits resulting from a falling off in the carrier's revenues from freight, passenger and express services.

III. The claim of confiscation, based upon the results of the cost study, is without merit. In the first place, facts supporting such a serious charge are not set out in the pleadings, and, secondly, the proof relied upon is insufficient to support the charge. Far more positive efforts to show confiscation than the evidence in this case were held insufficient in *Baltimore & Ohio R. R. Co.* v. *United States,* 298 U. S. 349. Failure to obtain business does not justify the imposition of charges that are exorbitant and unjust. *Public Service Comm.* v. *Utilities Co.,* 289 U. S. 130.

IV. A classification of railroads 100 miles or over differently from roads under 100 miles is a reasonable one, and such a classification has been sustained by this Court in numerous cases. *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80, 95.

V. (1) This case was decided by the Commission solely upon the record therein, and its reference to other cases was simply to show that in such proceedings consideration was given to other factors as well as the results of the cost studies.

(2) It would seem reasonable to permit the Commission, in a proceeding fixing mail rates, to make comparisons of revenues the carrier receives from other services in the same trains, and the lower court's holding that such a fact was immaterial was erroneous in law, and involved a substitution by that Court of its judgment for that of the Commission as to the weight to be accorded the evidence.

(3) There was no inconsistency, as alleged, in the Commission's findings. The ultimate findings of Division 5 and of the entire Commission, based upon different records, were that the existing rates were fair and reasonable, and in both cases increases were refused.

(4) The lower court's holding that its prior decision, unreversed, established the law of the case, was erroneous. *United States* v. *A., B. & C. R. R. Co.*, 282 U. S. 522. The first decision of the Commission was by Division 5 upon one record; the second decision, upon an augmented record, was by the entire Commission.

ARGUMENT

I. A specially constituted three-judge court assembled under the provisions of the Urgent Deficiencies Act has no jurisdiction to review an order entered by the Interstate Commerce Commission under the provisions of the Railway Mail Pay Service Act of July 28, 1916

A fundamental rule is that the Government may not be sued without its consent. As a necessary consequence of this rule it follows that the only permissible suits against the United States are such as have been expressly consented to. The United States has consented to be sued in the Court of Claims in respect of certain matters, including claims founded upon acts of Congress (except pension acts) and upon contracts, express or implied. It has consented to be sued in other special instances, for example, in suits in the District Court to set aside orders of the Commission entered in the performance of its duties under the Act to Regulate Commerce, as amended, (Urgent Deficiencies Act, 38 Stat. 219; U. S. Code, Title 28, Sections 41, 43, 44) now officially cited as the Interstate Commerce Act, (41 Stat. 499; U. S. Code, Title 49, Section 27).

While in the case of *United States* v. *Los Angeles Railroad Company,* 273 U. S. 299, this Court indicated that one of the criteria of a reviewable order is as to whether or not the particular Commission action is determinative of rights or obligations, and while in the case of *Alton R. R. Co.* v.

United States, 287 U. S. 229, 237, and other cases, this Court has held that in construing an order of the Commission it will look at the substance and not be governed by mere matters of form (a rule with which we are in accord), the decisions in both these cases dealt with orders relating to commerce regulation issued under the Interstate Commerce Act and were directed to carriers which were subject to the Commission's regulatory authority. The order here involved was issued pursuant to special legislation constituting no part of the Interstate Commerce Act. The District Court's special jurisdiction under the Urgent Deficiencies Act was intended only as a part of the existing system for the regulation of interstate commerce under the Interstate Commerce Act and cannot be extended to afford review of Commission action fixing just compensation for a taking by the Government of carrier property, enacted, as we have said, by special legislation constituting no part of the Interstate Commerce Act. The history of the District Court's jurisdiction is outlined in *Procter & Gamble Co.* v. *United States;* 225 U. S. 282, and in *United States* v. *Los Angeles Railroad Co.,* 273 U. S. 299. It is shown in those cases that the Commerce Court Act of 1910 created the commerce court and conferred upon it jurisdiction to set aside, as well as to enforce, orders of the Commission issued under the Act to Regulate Commerce, and that subsequently the Urgent Deficiencies Act

abolished the commerce court and transferred its jurisdiction to the district courts. That the court's special jurisdiction was created as an amendment to and is confined to orders issued under the Act to Regulate Commerce, is apparent from the opinion in the *Procter & Gamble Case,* pages 294–295:

> * * * It cannot be disputed that the act creating the Commerce Court was intended to be but a part of the existing system for the regulation of interstate commerce, which was established by virtue of the original adoption in 1887 of the act to regulate commerce, and which was expanded by the repeated amendments of that act which followed, developed in practical execution by the rulings of the body (Interstate Commerce Commission), upon whom was cast the administrative enforcement of the act, the whole elucidated and sanctioned by a long line of decisions of this court. That in adopting the provisions concerning the Commerce Court and making it part of the system, it was not intended to destroy the existing machinery or method of regulation, but to cause it to be more efficient by affording a more harmonious means for securing the judicial enforcement of the act to regulate commerce is certain. The act creating the Commerce Court (June 18, 1910, 36 Stat. 539, c. 309) was entitled "An Act to create a Commerce Court, and to amend the Act entitled 'An Act to regulate commerce', approved February fourth, eighteen hundred

> and eighty-seven, as heretofore amended, and for other purposes." The first six sections, which called into being the Commerce Court and defined its powers, all demonstrate the purpose as above stated, that is, to adjust the powers and duties of the newly created court in such manner as to cause them to accord with the system of regulation provided by the act to regulate commerce as it then existed.

A construction permitting review under the Urgent Deficiencies Act of an order made by the Commission fixing just compensation for a "taking" of the carrier's property used in transporting the mail, appears to us to be not only out of place in a system set up solely for commerce regulation, but likewise would not be in harmony with the general scheme of jurisdiction in respect of suits against the Government. *Procter & Gamble Case, supra,* pp. 299–300.

This Court has held that in transporting the mails, the carriers are not acting in a common-carrier capacity. *A., T. & S. Fe Ry. Co.* v. *United States,* 225 U. S. 640, 649. See also *German State Bank* v. *Minneapolis, St. P. & etc. Ry. Co.,* 113 Fed. Rep. 414; *Bankers Mutual Co.* v. *Railroad Co.,* 117 Fed. Rep. 434. The Railway Mail Pay Service Act is a separate statutory enactment, no part of the Interstate Commerce Act, by amendment or otherwise, conferring upon the Commission the judicial duty (*United States* v. *New York Central R. Co.,* 279 U. S. 73, 78) of fixing reasonable rates of pay

for requisitioned mail services. The 1916 Mail Pay Act does not incorporate, either directly or indirectly, by reference or otherwise, the provisions of the Urgent Deficiencies Act enacted in 1913 for the review of Commission orders. Indeed, the 1916 Act makes no provision whatever for Court review of the Commission's action thereunder. We do not contend that the Commission's order fixing rates of mail pay is final and not reviewable in some court; what we do urge is that a specially-constituted three-judge court, constituted as was the lower court in this case, is not the proper tribunal. If, as held by this Court, the carrier in transporting the mail is not acting in a common-carrier capacity, it is clear, we think, that in making orders affecting mail pay the Commission is not exercising a regulatory supervision over the carriers in their common-carrier capacity.

Our views are supported by the decision of this Court in *Gt. Northern Ry.* v. *United States,* 277 U. S. 172, which involved a certificate issued by the Commission under the so-called guaranty provisions of the Transportation Act, 1920, Secs. 209 and 212. This court said:

> The function imposed upon the Commission by § 209 is solely that of determining the amount required to make good the Government's guaranty. It is not an exertion of the delegated power to regulate interstate commerce. It is an incident of the World War—a temporary, non-recurrent task,

which might appropriately have been performed for the Treasury by its Comptroller or auditors, or by other trusted official. Congress selected the Commission for this service, doubtless, because of its special fitness. For the Commission had knowledge of railroads and experience in railroad accounting; it had the custody of the records of railroad operations; and its staff was competent to make speedily the necessary investigations.

Transportation Act, 1920, did not confer upon the Commission power to order anything in connection with the issue of the certificates. There is in the certificates no direction, no word of command. They are the recital of a finding of fact. They are addressed to the Secretary of the Treasury; and only to him. The form of the certificate expresses appropriately the character of the service performed by the Commission. * * *. Because issuing certificates is not a part of the Commission's delegated power to regulate commerce and is not an incident of such regulation, the special remedy provided by the Urgent Deficiencies Act is not available to review the legality or correctness of its action in doing so.

In holding the special remedy given by the Urgent Deficiencies Act was inapplicable, the Court, at page 182, said:

* * * For the inapplicability of the special remedy given by the Urgent Deficiencies Act is due to the fact that the certificate deals with a subject matter not within

> the scope of the Commission's duty to regulate commerce, and hence, not within the purview of that remedy. In this respect, among others, it differs from the order involved in *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456.

After stating that the court had "no occasion to enquire whether a remedy at law or some other remedy in equity is available" as the "mere fact that the certificate may be conclusive, if it be a fact, would not entitle the Company to a judicial review", (p. 182) the opinion concludes:

> * * * We find no reason for thinking that because Congress confided to the Commission the task of certifying the amount to be paid to carriers from the public treasury, as an incident to the World War, it thereby consented that the United States should be sued in the special proceeding in equity devised long before to control the Commission's execution of its regular functions in enforcing the Interstate Commerce Act.
>
> (Id. 182–183).

II. The action of the Commission in declining to order an increase in the rates of railway mail pay for the Georgia & Florida is supported by substantial evidence and was not arbitrary in any respect

It was recognized by the Commission early in its deliberations under the Mail Pay Act that, in fixing rates for transportation of the mail, it was dealing with a "perplexing problem" in that "there are many circumstances and conditions in connection with its transportation that do not obtain with

respect to any other traffic." *Railway Mail Pay*, 56 I. C. C. 1, 63. There was a difference of some $50,000,000 a year in the amount the Post Office Department believed it should pay and the amount the carriers as a whole claimed. (Id., p. 27.) Under rates established by Congress, payment to the railroads for mail service in 1917 totaled $74,165,246. At the time of the Commission's first decision under the Mail Pay Act (56 I. C. C. 1), the payments amounted to $78,132,000. In 1926, the payments had increased to $96,326,466 (*Railway Mail Pay*, 144 I. C. C. 675, 677).

There are five classes of mail service; (1) full railway post-office car service, consisting of the transportation, handling, etc., of mails in full 60-foot cars; (2) storage car-service, which is the transportation in full cars of made-up mails in bulk; (3) storage space service, which is the transportation in a portion of a car of made-up mails in bulk; (4) apartment railway-post-office car service,[5] and (5) closed-pouch service.[6] Only the last

[5] In *Railway Mail Pay*, 56 I. C. C. 1, 10, the Commission said that Apartment Railway Post Office Car Service consists of the transportation, handling, distribution, and delivery of mails en route in apartment cars of 30 feet and 15 feet; that a part of the car is separated by a partition from the remainder of the car; that the amount of storage space in apartment cars is limited as distribution is the primary function of the car, and that made-up mails are stored in storage-space units run in connection with the apartment cars, usually in the baggage end of the same car.

[6] Closed-pouch service is transportation and handling of made-up mails in baggage cars on trains upon which no

two units of mail service are authorized and used on the Georgia & Florida, a 15-foot railway post-office apartment unit, the rate for which is 14.5 cents per mile and a 3-foot closed pouch unit, the rate for which is 4.5 cents per mile. (R. 6) During the test period 95 per cent of the service was rendered in the 15-foot apartment unit paying the higher rate. (R. 6)

The method by which the appellee and the Department derived the cost data in this case was the method used in other Mail Pay Cases, and is as follows:

There was substantial agreement between the Department and the railroad as to methods of allocating and apportioning expenses and ascertaining property investment as between freight and passenger services. Rules prescribed by the Commission governing separation of operating expenses between these services on large steam railways were used in preparing the cost data. Expenses of the passenger service were then directly allocated as far as possible to passenger proper, including baggage and miscellaneous, express, and mail. The

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R. P. O. of apartment cars are authorized. This service is entirely in the hands of the railroad company, its employees loading, handling, and delivering all the mails and being held responsible therefor. The mails handled in this service comprise all classes. The limits of service authorized by the law are of 7 feet and 3 feet—both sides of car. (*Railway Mail Pay*, 56 I. C. C. 1, 11). Additional units were authorized by the Commission in a subsequent decision. (*Railway Mail Pay*, 144 I. C. C. 675, 719.)

remaining expenses common to all three services were apportioned upon the space ratios. A test period [7] of 28 days, from September 28 to October 25, 1931, for the purpose of obtaining space and other data, was agreed upon. (R. 6) Forms were prepared and sent to the railroads, providing for reporting all space operated in passenger trains, classified according to the use to which the space was devoted; that is, all space used for passenger service proper, including baggage and miscellaneous, express, and mail was reported. (R. 6) In this classification, however, the space authorized for mail instead of that actually used was assigned to mail. The unused space [8] and the unoccupied space in combination and mixed-traffic cars was also reported. The distribution of the total among the several services is made in accordance with "Plan 2." (R. 6)

Under Plan 2, car-miles and car-foot miles of operation in cars employed exclusively for one service are referred to as full cars, whether com-

[7] The 1931 test period was not supplemented by figures based upon a test for later years. (R. 41) The trial in the District Court was in December, 1936. That appellee might well have been required to bring forth evidence and estimates "as near as possible to the time of trial in the district court" is indicated by this Court's decision in the Citrus Fruit Divisions Case, *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 379, 380.

[8] "Unused space" in the instant case represents the unoccupied space to be found in the baggage end of combination cars and in mixed-traffic cars operated to accommodate the three classes of service.

pletely loaded or not, and the entire operation of each is allocated to the service to which it is assigned. (R. 6) The space in combination and mixed cars is allocated to each service according to the space used, except that (1), space authorized for mail is regarded as space used (R. 7) and (2) all space in separate apartments, (whether for passenger, mail, or express) in combination cars is treated as used space and is assigned to the service for which the apartment is used. The unused space, i. e., the unassigned space, in combination and mixed cars is apportioned among the three services in proportion to the space used by each service in such cars.[9] Testimony and exhibits showing the results of these studies were fully covered at the hearings.

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[9] In *Railway Mail Pay*, 144 I. C. C. 675, 681, 682, the Commission said:

"Plan 2 recognizes the fact that an apartment is only a fraction of a car, that the operation of that fraction requires the operation of a whole car and that the operation of a whole car necessarily causes the operation of a certain amount of unused space in the remainder of the car. The justification for apportioning some of this unused space to the service using the apartment is that the car is the unit of operation and that the unused space outside the apartment, necessarily operated in a combination car to supply the space required for service in such cars, is due to the apartment service as much as the services in the baggage end. We have considered the combination car to be a mixed traffic car and have dealt with the unused space therein in the same manner as in any other mixed car irrespective of the existence of the partition separating the apartment from the rest of the car." * * *

The results obtained are described in the report on rehearing as follows:

> In the test period, 3,045,704 car-foot miles were operated in passenger-train service. The distribution of this made by applicant to the three services, in the manner described, resulted in final space ratios as follows: Passenger proper, including baggage and miscellaneous, 78.05 percent; express 6.92 percent; and mail 15.03 percent. The total expenses allocated and apportioned to the passenger-train service as a whole for the year 1931 was $315,272. Of this, $1,295, or 0.41 percent, was directly assigned to passenger service. The remainder, $313,977, was regarded as expense common to the three services and was apportioned among them by applying the space ratios of the test period. In this distribution, 15.03 percent, or $47,191, was apportioned to mail service.
>
> Investment in road and equipment allocated and apportioned to passenger-train service by applicant for the year 1931 was $3,554,377. The amount apportioned to mail by using the mail space ratio of 15.03 percent was $534,223. Applicant computes a return on this amount, at 5.75 percent, of $30,718. The expense plus the stated return equals $77,909. The mail revenue for 1931 was $35,728. The additional revenue required based upon these figures would be $42,181, or an increase of 118 percent.
>
> (R. 42–43)

This 118 percent or $42,181, is what the carrier refers to as a "needed increase". The report of

the Commission (R. 43) shows that that figure was computed solely by applying the ratios derived from the space data of the test period of 28 days in 1931, to the expenses for the entire year of 1931, and adding a return of 5.75 percent upon an amount calculated to be the investment in road and equipment, assigned to mail service, upon the basis of the mail space ratio. It was apparent on the face of the computations that if the data of the test period were not representative [10] of the operations for the entire year 1931, the ultimate result was distorted. A very simple calculation showed that the car-foot mile figures of the test period extended to one year were only 82.78 percent of the actual car-foot miles operated in that year. Therefore, it was wholly improper to regard the test period data as representative of the year's operation, to apply the ratios obtained from it to the operating expenses for that year, and use the ratio of the mail expense so derived to compute an amount to be assigned to the mail service as its share of the carrier's investment in road and equipment. As a result of this adjustment the Post Office Department derived a space ratio for mail of 12.96 percent instead of 15.03 percent, and the application of the lower ratio to the computed expenses of the passenger-train service resulted in a computed mail expense of $40,673, or $6,518 less than the amount first computed. (R. 43).

[10] As showing how unrepresentative the figures for the test period are: In 1931, the apartment service constituted but 72.15 percent of the total (R. 6), while in the test period it was 95 percent. (R. 6)

Investment in road and equipment figures were detailed in the report, and also a discussion of the amount to be allocated and apportioned to the mail service. (R. 43.) In showing these figures, and in explaining how the carrier concludes that it now requires an increase of 87.4 percent to assure it reasonable rates, the Commission said:

> The department's exhibits showed applicant's investment in road and equipment allocated and apportioned to passenger-train service as $3,536,834, or $17,534 less than applicant's figures. Under plan 2 this was apportioned among the three services upon the ratios of total railway operating expenses allocated and apportioned. These ratios were substantially the same as the space ratios, the mail-expense ratio, for example, being 12.90 percent and the space ratio 12.96 percent. The total mail-service investment thus derived was $457,082. A return of 5.75 percent upon this sum amounted to $26,282 which, with the computed expense, brought the total claim for increased compensation to $31,227, to meet which would require an increase of 87.4 percent in the rates now paid.
>
> (R. 43)

The carrier would have the court treat these statements as formal findings of the Commission, but the mere statement of the mathematical results obtained by applying certain percentages to certain figures does not constitute formal findings that any particular facts are thereby proved nor establish anything as a fact by which the Commission or

this Court is bound as a matter of law. The Commission stated those figures in its report to show what the carrier claimed, the basis for that claim as set up by it, and the computed results of the "cost study" as related by the parties in oral testimony and shown in their exhibits.

The position of the carrier appears to be that a claim, such as that presented to the Commission by it, is settled as a matter of law by the mathematical results obtained in a statistical study made according to an agreement between claimant and the Department as to methods and formulas to be applied in connection with it. If such position were sustained, the Commission would be deprived of all real authority in the performance of its function under the powers granted it by Congress to fix and determine the fair and reasonable rates and compensation for the carriage of mails by railroads. It would become nothing more than a checker or annotater of the statistics submitted to it. Appellants take a more rational view of the Commission's functions than that. The District Court, also, appears to entertain the same view as appellee. For, after saying that "Neither applicant (the appellee) nor this Court entertains the view that the hypothetical cost is 'necessarily conclusive' " (R. 57) it added that "It is merely the fairest method that has been devised." (R. 57)

The carrier endeavors to make some point of the fact as stated by the Commission, (R. 43) that it did not contest the adjustment made by the Depart-

ment. The argument seems to be that by not contesting the adjustment of the space figures of the test period the carrier surrendered a portion of a just claim and that as the adjustment operated against that claim and gave an alleged advantage to the Department, no further adjustment reasonably could be made. That argument is merely an extension of the argument heretofore considered, namely, that the Commission is foreclosed by such action of the parties from going further into the evidence, from studying the essential character of the space, the operating facts connected with it, and the kind and character of the service rendered by the Georgia & Florida in transporting the mails, and from making any adjustments in the figures in the light of its own examination of the data.

The Commission declines to accept such a theory as to its duty and powers under the mail pay acts. Even if the parties had not made the adjustment in the original data referred to, the Commission would have had the right to make it itself in view of the evidence. There is no particular significance, so far as the Commission is concerned, in the fact that the carrier failed to contest the adjustment when made by the Department.

In both reports, the Commission weighed the results of the cost study; in the first report it characterized the study as an "approximation to be given such weight as seems proper in view of all the circumstances," (R. 9) and in the second report

it spoke of the "cost computed in the manner described" as a "hypothetical cost" (R. 44), and referred, on that account, to the many other factors the Commission must consider in a case such as this. (R. 44) The weight to be accorded by the Commission to the cost study, like the question of the weight to be accorded any other item of evidence, is peculiarly for the Commission. *Illinois Commerce Commission* v. *United States,* 292 U. S. 474, 480–481. Cf. *Baltimore & Ohio R. R. Co.* v. *United States,* 298 U. S. 349.

(A) RELIABILITY OF THE SPACE STUDIES

In addition, the Commission refers to facts (R. 45–48) tending to raise doubt as to the reliability of the space study as a basis for determining the cost of service, because (1) the 3-foot units of authorized space are regarded as the full space used by mail in such service, regardless of the mail load carried, and (2), the carrier operates a 30-foot apartment to fill the authorization for a 15-foot apartment.

(1) Actual use of 3-foot closed-pouch units

It appears to us quite proper for the Commission to consider the use actually made of the authorized space and to consider the fact that such use was far below the capacity of the space. Where the authorized space is not fully used such a method tends to increase the true mail-space ratio in two ways, first, by the amount of space in the authorized units

not actually occupied by the mails and, second, by apportioning to the mails a larger share of the unused space in the remainder of the car in which the mail is carried, said unused space being divided among the several services using the car in accordance with the space directly assigned to each service. The report (R. 47–48) reads:

> * * * The full capacity of a 3-foot unit, which contains 121.5 cubic feet, is 56 bags of mail or the equivalent in packages not carried in bags. The largest number carried during the test period in the 3-foot units on the various trips, including all routes, ranged from 6 to 27 bags, except for service on Sundays only between Tennille and Keysville, Ga., where 61 was the maximum. The average of the maximum loads, however, on all trips, ranged from 2 bags on the Broxton-Douglas route to 20 bags on the Midville to Statesboro, via Graymont route, except on trips between the two points above named, where the maximum was 55 bags. The minimum number carried on any trip ranged from 1 to 6. The average minimum load ranged from one bag on the Tennille-Keysville route to nine bags on the Douglas-Broxton route. The space furnished to meet authorizations for 3-foot units is not set aside for exclusive mail use. The mail sacks and packages are carried with the baggage and express and may actually use more or less than 3 linear feet of car length, depending upon the number and the arrangements

for loading and unloading the mail, baggage, and express en route.

The cubic capacity of a three-foot unit in a car 9 feet wide is 121.5 cubic feet. This allows for an aisle space 1½ feet wide at the floor and 3 feet wide at the top and the piling of the mail to a height of 6 feet. If the mail were actually piled in such a unit on appellee's trains the unit would be rarely filled to capacity. In actual practice closed-pouch mail is carried with baggage and express matter and dispatched at the various railroad stations with the latter. Three linear feet of car length, however, in a car 9 feet wide, without any allowance for aisle space, supplies 27 square feet of floor area, so that even on that basis, it would seem that average maximum loads of from 2 to 20 bags, or the equivalent in packages, carried by the Georgia & Florida occupied but a small amount of the floor area. The fact that stands out in this whole proceeding is the small amount of mail actually transported by this carrier.

The Commission properly considered also the method of handling the mail in the two types of service furnished by the carrier, that is, apartment service and closed-pouch service. Its statements as to those matters (R. 49–50) were:

> The record shows that mail in the 15-foot apartment service was handled en route by post-office clerks, and that mail in the 3-foot authorizations was handled on the trains by

railroad employees. The latter service in 1931 constituted 27.85 percent of the total mail service and furnished 12 percent of the mail revenue. The record also shows that the average maximum mail load in the 3-foot units, except over the one run previously mentioned, ranged from 2 to 20 bags or outside packages, which was below the maximum load of 56 bags or the equivalent in packages. If adjustment in the computed data were made to reflect the actual use of the 3-foot units, the actual car-foot miles of mail service probably would be less than the authorized and the unit revenue per car-foot mile from mail would be somewhat greater. Expense of transporting mail per authorized car-foot mile, in view of the service rendered by applicant on its trains in connection with it, might reasonably be considered to be somewhat less per car-foot mile than for passenger-train service as a whole.

In determining what are fair and reasonable rates of pay, the Commission is not prohibited from considering the method of handling mail on the train, nor from considering the fact that the average maximum load carried in the 3-foot units of closed-pouch space, except over one run, ranged from 2 to 20 bags, or packages outside of bags, as contrasted with the maximum capacity of 56. It also is clearly permissible for the Commission to comment upon the probabilities inherent in a possible adjustment of the data made to reflect actual

use, and to suggest that the expense of transporting mail per unit of authorized space "might reasonably be considered somewhat less per car-foot mile than for passenger-train service as a whole." (R. 50). Appellants submit that such statement is supported by evidence of actual operation detailed in the report and further submits that in determining reasonable compensation for the minimum unit of space that can be authorized, the actual quantity of mail carried in such space is an important factor to be considered.

The statistics with respect to the 3-foot closed-pouch unit cannot be explained away as unimportant. It is true that in the first report, Division 5 referred to the "small amount of closed-pouch space in relation to the total in the test period." (R. 9) But reading those words in their context, it is apparent that the Commission was referring to the small amount in relation to the total in the test period and not to the relation on the basis of a year's operation which showed that the miles of such service constituted 27.84 percent of the total miles of mail service and that the revenue therefrom was 12 percent of the total mail revenue. (R. 9) In the report of the Commission on further hearing the actual use of that service by the Department was again discussed. (R. 47–48). It is obvious, therefore, that both Division 5 and the Commission did not treat that service as unimportant.

Appellee urged in the court below that "it should not be overlooked that all closed pouch units are arrived at wholly on an average count of pouches and packages." In the instant case the Department showed the actual number of pouches and packages carried in the 3-foot units on all trips during the test period and compared these figures with the average number derived from tests described in 95 I. C. C. 493, 496. (R. 47).

(2) Operation of oversize railway post office apartment

Another reason why the space data of the test period "cannot be accepted as an accurate guide to an ascertainment of cost," arises in connection with the operation of the 15-foot railway post-office apartment. (R. 45.) The evidence shows, and the Commission found, that for its own convenience (R. 45), the carrier operates a 30-foot R. P. O. apartment to fill the authorization for a 15-foot apartment. (R. 45). The 30-foot apartment was partitioned from the remainder of the car. In the said remainder of the car express, baggage, and miscellaneous traffic were carried. Such a car is designated in mail pay proceedings a "combination" car, as distinguished from a car with no partition to segregate classes of traffic, designated a "mixed-traffic" car. Partitions are placed in combination cars for the specific purpose of supplying space for exclusive use of the particular class of service using the apartment thus segregated. A post-office apartment is fitted with racks, cases,

tables, etc., and can not be used for any service other than mail service when mail is carried in it. The report, in reference to the operation of the 30-foot railway post-office apartment instead of a 15-foot railway post-office apartment, further states (R. 45):

> * * * It results in the operation of an amount of unused space equal to the authorized 15-foot apartment and thus increases the amount of space and the expense apportioned to mail. * * *.

Appellee disputes the accuracy of this statement, but that it is true can be demonstrated as follows: Unused space in combination cars normally occurs only outside of apartments, because in the space study all space in apartments designated for the exclusive use of a particular service is allocated directly to that service. The Department, however, is authorized by law to request service only as the needs of the postal service require and pursuant to that duty it requested this carrier to furnish a 15-foot railway post-office apartment. Instead of doing so, the carrier, for its own convenience, elected to run the combination car containing a 30-foot railway post-office apartment. Under those conditions the Department properly refused to accept in the space study the direct allocation to the mail of the full 30-feet of railway post-office apartment space, but only 15 feet. The remainder of the 30-foot apartment was treated as unused space and

was added to the space classed as unoccupied, or unused, which, as before stated, occurs normally in the combination car only outside the apartment, and in mixed-traffic cars. The 15 feet unused in the 30-foot railway post-office apartment is an entirely different category of space from unused space in the remainder of the car but to account for it in the space study it "was added to unoccupied space in the combination car" (R. 45) and "to the total unused space in the combination and mixed-traffic cars and apportioned among mail, express and passenger services in proportion to the space used in such cars." (R. 45) The 15 feet of space thus added to the total unused space was, and continues to be, wholly different from the other unused space, because it was and is a part of a segregated apartment, fitted with railway post-office equipment and wholly excluded from use by any service. The unused space in the remainder of that car and in mixed-traffic cars is free space available at all times for use by any service; it fluctuates in amount during the run of the train as the need for space by baggage, express, and miscellaneous traffic fluctuates.

Contrary to the carrier's contention, the location of the partition plays an important part in determining what space is classed as used and what unused. If the 15 feet of space unused in the 30-foot apartment had been in the other part of the combination car, stripped of its postal equipment, it

would have been available to meet the needs of the express, baggage and miscellaneous traffic. The space allocated to such other services in that event probably would have been different, because the space used by each such service, unlike the mail service, was determined in the space study on a measured basis as stated in the report (R. 42) as follows:

> * * * Space authorized for mail was considered to be the occupied or used mail space regardless of the extent it was actually used. Space occupied by passenger and express services in such cars was measured at certain points on the railroad where the load carried for each service was considered to represent an average for the whole route. Neither the first nor the last part of the run was taken. The average space thus measured was used in computing the total car-foot miles occupied by each such service for the run of the car. * * *.

The Commission, in connection with its statement that the extra 15 feet of space in the railway post-office apartment was added to the total of other unused space, said (R. 45–46):

> * * * This was done, apparently, upon the theory that if the apartment had been changed to a 15-foot apartment, the remainder of the 30-foot apartment would have been unused and that, therefore, the mail would have been charged, in the space study, with the same proportionate amount. The

assumption, however, rests upon the further assumption that the average measured space reported as used by express and by baggage and miscellaneous services would have been the same.

The space occupied by passenger and express services in the combination car, which was determined upon the measurement basis, obviously depended upon the space available for such services and the amount of baggage, express, and miscellaneous traffic carried. If the 15 feet of surplus space in the 30-foot railway post-office apartment had been free of postal racks and equipment and had been on the other side of a partition placed so as to separate a 15-foot apartment from the baggage and express end of the car, it would have been available for use and some of it might have been used and allocated in the measured space basis to such other services. It was, however, wholly segregated and occupied with fittings of a 30-foot railway post-office apartment and unused only in the sense the Department did not use it. To say that such space occupied with postal car fittings is of the same category as wholly free unoccupied space is contrary to the fact and contrary to common understanding. The space study dealing as it did with all types of space, classed the 15 feet as wholly unused space and as such the mail service was made to assume a proportionate part. The Department in accepting that share conceded something it did not have to concede because that unused fitted space

was operated by the carrier solely for its own operating convenience, and to that extent the Department treated appellee generously. The Commission, however, was not bound by that concession and could form its own conclusion as to the effect of so allocating the unauthorized and unused 15 feet of fitted railway post-office apartment space. Appellee would make no distinction between space fitted with post-office racks, cases and other equipment, and unencumbered space in the remainder of the same car. This assumes that furnishing a 30-foot railway post-office apartment, fully equipped with post-office car fittings, in lieu of a 15-foot railway post-office apartment similarly equipped, resulted in the operation of identically the same kinds of space in the whole car with identically the same proportions of each kind. The actual operating facts can not thus be ignored. It is to be remembered that all space in the authorized 15-foot railway post-office apartment is charged against the mail even if only partly used and in that respect the space is treated in the space statistics in the same manner as the space in a full passenger car or in a passenger apartment.

The operation of the 30-foot apartment, although the Department has need for and authorizes only a 15-foot apartment, constitutes a substantial part of the total service rendered. In the test period, 95 percent of the service was rendered in the 15-foot authorization. (R. 6) In the calendar year 1931,

the apartment service constituted 72.15 percent of the total. (R. 6). The Department does not and may not make any use of the extra 15 feet of space in the 30-foot apartment. It does not, in fact, use all of the 15 feet authorized. An inspection of the 15-foot authorization in the said apartment, made in March, 1935, disclosed that the distribution facilities and the storage space actually used in the authorized 15 feet did not average over 50 percent of the space available in that amount of authorized space. (R. 45) Faced with those facts, the Commission in its report showed what the effect would be if the 15 feet of unused fitted space in the 30-foot railway post-office apartment had not been treated in the space analysis as wholly free space available for use, and had not been added to the unused freely available space in combination and mixed-traffic cars. Its statement on that point is as follows (R. 46):

> * * * The amount of unused space due to the operation of the 30-foot apartment in lieu of a 15-foot apartment was 247,101 car-foot miles and the share of this apportioned to mail was 79,541 car-foot miles. If this amount were eliminated from the total apportioned to mail and assigned to the other services upon the assumption it was and is unnecessarily operated insofar as mail is concerned, an assumption justified upon this record, the mail-space ratio would be reduced to 10.79 percent and the computed mail expense would be reduced to $34,017 or

> $1,711 less than the revenue. This is 27 percent less than the expense computed from the unadjusted test-period data and 16 percent less than that computed by the department upon its adjusted data. * * *.

In any scrutiny of a cost study based upon an analysis of underlying operating space statistics, it is proper to consider the cause of and the occasion for the operation of any space classed as unoccupied or unused. In this instance the character of that space is also important. A consideration of the operating facts reveals clearly that the carrier operated the extra 15 feet of unused fitted space for its own convenience and has continued to operate it to the present day. The total length of the car is 55 feet and thus the 15 feet of unused fitted space constitutes 27.2 percent of the entire car. It is clear that such space is unnecessarily operated as space unavailable for use by other services. It is entirely reasonable to examine such facts to determine whether it is just to charge any part of the space so operated to the mail service and thus increase the mail share of the space, increase the mail space ratio and increase the share of the common expenses charged to mail. When it is considered that in the same study the apportionment of common investment in road and equipment is made upon the basis of the ratios of expense thus computed the cumulative effect of including an amount of space not properly chargeable can readily be seen.

Without following the matter through all the possible computations it can be observed, from the language last quoted from the Commission's report, that the elimination from the mail of any part of the operation of the 15 feet of unused fitted space in the oversize apartment converts a computed operating deficit from mail of $4,945 to a computed operating income of $1,711. (R. 46) (R. 43)

Appellants submit that it was the Commission's duty to go behind the results of the cost study, to analyze the assumptions upon which it is based, and to check the results in the light of actual operating conditions.

(3) Comparisons of revenues and expenses

The Government invites the Court's attention to the fact that comparisons of revenues and expenses upon the bases of common units of service per mile have been made by the Commission in all mail pay proceedings; in passenger-rate proceedings (cf. *Passenger Fares and Surcharges,* 214 I. C. C. 174, 179, 180, and appendix 1); in freight rate proceedings (cf. *Cottonseed, Its Products, and Related Articles,* 188 I C. C. 605, 636); in express rate proceedings (cf. *Express Rates,* 1922, 83 I. C. C. 606, 647, 651); and in cases dealing with divisions of joint rates between railroads (cf. *Divisions of Freight Rates,* 203 I. C. C. 299, 325, 327).

Under these circumstances, the following comparisons, indicating liberality on the part of the Commission in fixing rates of mail pay, become

pertinent. In the report on further hearing (R. 48-49) the Commission said:

> A comparison of revenue received by applicant from the three services rendered in passenger-train service shows that the mail service pays considerably more for equivalent units of service than passenger proper, or express. The units used in this comparison are derived from the space ratios and include proportionate amounts of unused space, without considering the amount and character of such space or the load carried in the 3-foot units.
>
> In passenger-train service operations in 1931, applicant received $35,728 from mail service for 12.96 percent of the total car-foot miles of service, $7,593 from express for 6.69 percent, and $36,322 from passenger proper for 80.35 percent. Revenue per car-foot mile, based upon the above percentages of space, from mail was 5.75 mills, from express 2.36 mills, and from passenger proper 0.94 mill. Upon a computed unit-of-service basis, the amount paid by the department for carrying mail was about two and one-half times as much as the amount received by applicant from carrying express and about six times as much as the amount received for passenger service proper. Mail revenue from 12.96 percent of the total car-foot miles operated was 44.86 percent of the total passenger-train service revenues, express revenue from 6.69 percent of the car-foot miles was 9.53 percent of the total, and

passenger revenue proper from 80.35 percent of the car-foot miles was 45.61 percent of the total.

The foregoing computations are derived solely from the space and revenue studies. They show that in relation to the other services the department pays a considerably greater amount per car-foot mile of service than the carrier receives from other services rendered in the same trains.

The Commission made a further analysis comparing the average computed expense per car-foot mile of 0.6573 cents for passenger-train service as a whole, based on operations in 1931, including therein the total space operated, whether used or unused, with the computed expense per car-foot mile, derived from the space study, for each of the three classes of service furnished in passenger trains, passenger proper including baggage and miscellaneous traffic, express, and mail. The figures so computed indicated that the expense per car-foot mile for each service, namely 0.658, 0.655, and 0.654 cents, respectively, approximated the average expense per car-foot mile assigned to passenger service as a whole. The report then stated that for the year 1931, the average revenue received per car-foot mile of authorized mail service was 1.0297 cents, which was 56 percent in excess of the average computed expense per car-foot mile for passenger-train service as a whole for all space operated. (R. 49.) The Commission nowhere in the

report stated, as appellee contended below, that the difference or any other amount represented a profit to the carrier nor showed how much profit it would make were it to operate its passenger service as solid mail trains. The Commission gave the result of the computations as one of the factors to be considered in arriving at its ultimate conclusion that the rates now paid were fair and reasonable.

The analysis of the space statistics and the cost statistics indicated that the average expense per car-foot mile of all space operated in the passenger trains and the average expense per car-foot mile for each service, including for each service a proportionate amount of the unused space operated in combination and mixed-traffic cars, were about the same and that when those average expenses per car-foot mile were compared with the revenue per car-foot mile received from the actual mail space authorized by the Department and furnished by the carrier, the result indicated that the revenue received for mail space authorized and furnished was 1.0297 cents per car-foot mile as compared with an average expense per car-foot mile of 0.6573 based on the total car-foot miles operated in the entire passenger train service. (R. 49)

To avoid any misunderstanding of the basis of the comparison, the Commission pointed out (R. 49) that the comparison made of revenue per authorized car-foot mile of mail service with the average expense for passenger service as a whole plus

the stated return, and with similar figures for mail service "does not take into consideration any distribution of mail revenue to unused space apportioned to the mail." (R. 49)

The Commission quite properly rejected such conjectures and speculation as affording no basis for finding the existing rates unfair and unreasonable.

(4) Mail revenues have remained fairly stable

The report also shows that the carrier's mail revenues have remained stable as compared with its revenues from other services, reading in this connection:

> The data also show that in the three years 1929 to 1931, inclusive, mail revenues have been relatively more stable than the revenues from the other passenger-train services. In 1929, the revenue from passenger proper, including baggage, etc., was $111,289, from express $21,681, and from mail $40,904. In 1930, revenue from passenger proper, etc., was $64,038, from express, $12,463, and from mail, $39,087. In 1931, revenue from passenger proper, etc., was $36,322, from express, $7,593, and from mail, $35,728. Revenue from passenger proper decreased 67 percent, from express, 64 percent, and from mail, 12 percent.
>
> (R. 8).

The Commission referred, without comment, to the Department's proposal that "if the mail-pay

rates are increased consideration of economy might compel a discontinuance of apartment-car service where closed-pouch service at lower rates would suffice."[11] (R. 9)

(5) Nature of the Commission's power

The power conferred upon the Commission by the Mail Pay Act is not the ordinary power to regulate the charges of interstate railroads for performing common-carrier services; instead it is the power of fixing just compensation for a "taking" of private property for public use. In the condemnation case of *Olson* v. *United States,* 292 U. S. 246, this Court indicated that "prevailing prices" should be considered as a measure of market value (p. 257) and said that in reaching an estimate as to that figure "there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining" and added that elements dependent upon "mere speculation and conjecture" should be condemned as of no weight. (p. 257) In other words, the question is to be determined upon a proper consideration of all relevant facts.

[11] In this connection, and as tending towards considerations of economy, it is interesting to observe that testimony introduced at the reopened hearings showed that upon the abandonment by the carrier of its McAdoo Junction-Tennille Branch, for which the Department had paid the railroad $13,000 per annum, a contract was let to supply the patrons of the branch by "star route" at the rate of $1986 per annum. (R. 100–101)

Such "relevant facts" have been heretofore set out in great deal.

Appellee's theory appears to be that as its revenues from freight, passengers and express fall off, the mail rates should be increased to take care of these deficits. Carried to its logical conclusion, the rates for mail pay would fluctuate, yearly perhaps, dependent upon whether the carrier had a good or bad year in other services. Assuming a road handled nothing but mail, under that theory the computed deficit should be altogether reimbursed it in higher rates of mail pay. Obviously, the Commission could not establish a basis upon such fluctuating foundation.

III. The Commission did not commit any error in its construction of the law as applied to the facts in this case

The alleged error of law is stated in subdivision (6) of paragraph IV of the supplemental bill, which reads:

> (6) The carrying out of said order against petitioners deprives them of their property without due process of law and will take the private property of petitioners for public use without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States.
> (R. 40)

This is a direct allegation of confiscation. We seriously urge the insufficiency of the supplemental

petition as a basis for this charge. To support such a serious charge as confiscation, good pleading requires that pertinent facts should be set forth in the petition. *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U. S. 151.

In *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298, a confiscation case, the Supreme Court said:

> * * * it may be supposed that, other conditions being the same, a reduction in rates found to be excessive will cause a loss in revenue; and the question is not simply as to the amount of reduction but whether the rates as fixed would allow a fair return. *The bill does not show the value of property employed, the expenses of operation, or the return which would be permitted under the rates prescribed.* (Id. 315) [Italics supplied.]

To the same effect is the decision in *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447–448.

Far more positive efforts to show confiscation than the evidence in this case, detailed above, were held insufficient in *Baltimore & Ohio R. R. Co.* v. *United States*, 298 U. S. 349.

It will be recalled that the carrier is contending for an increase of 87.4 percent in its rates, almost double. We do not think it can be successfully contended that, under the circumstances of this case, any such drastic increase would be, in the language of the law, "fair and reasonable."

In *San Diego Co.* v. *Jasper,* 189 U. S. 439, this Court refused to find water rates to be confiscatory, and in the opinion said:

> * * * It hardly can have meant that a system constructed for six thousand acres should have a full return upon its value from five hundred, if those were all that it supplied. At all events we will not be the first to say so. If necessary to avoid that result we should assume that only a proportionate part of the system was actually used and useful within the meaning of the statute. Upon the whole case we are unable to say that the Circuit Court should have declared the rates confiscatory.
>
> (Id. 447)

In the case of *Smyth* v. *Ames,* 169 U. S. 466, 546-547, this Court said:

> * * * The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public.
>
> * * * What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the pubic is entited to demand is that no more be exacted from it for the use of a pubic highway than the services rendered by it are reasonably worth. * * *.

There are many other cases to the same effect; a late one, *Public Service Commission* v. *Utilities Co.*, 289 U. S. 130, after citing numerous cases, states:

> * * * The due process clause of the Fourteenth Amendment safeguards against the taking of private property, or the compelling of its use, for the service of the public without just compensation. * * *. But it does not assure to public utilities the right under all circumstances to have a return upon the value of the property so used. The loss of, or the failure to obtain, patronage, due to competition, does not justify the imposition of charges that are exorbitant and unjust to the public. The clause of the Constitution here invoked does not protect public utilities against such business hazards. * * *
>
> (Id. 135)

IV. The classification of roads over 100 miles in length different from those under 100 miles in length was reasonable

While appellee contended before the Commission that it should be classified more properly with roads less than 100 miles in length rather than with those above that distance because its low traffic density and low earnings per mile of road did not make it comparable with many class I roads receiving the same rates of pay, it did not urge that contention in the court below. Such classifications

have been repeatedly sustained by this Court, provided they are reasonable. *Southern Ry. Co.* v. *Greene,* 216 U. S. 400. In *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80, 95, a classification [12] by the Commission exempting railroads under 100 miles in length from making reports of per diem accruals to numerous car owners throughout the country was sustained as a reasonable one.

The essential question in this proceeding is whether the rates now being paid the carrier for transporting the mails are fair and reasonable. The Commission decided that question upon the record before it without reference to any classification of railroads.

V. Other contentions answered

(1) Reference to other cases

Appellee has persistently referred to certain expressions in prior mail pay cases to the effect that a cost ascertainment, made upon the method used in those mail pay cases and in the instant case, furnishes a sufficiently reliable basis for conclusions as to the reasonableness of rates of mail pay. The Commission in those cases also examined the data behind the cost ascertainment and received and considered other evidence. References to the character of such other evidence are given in the

[12] It will be recalled that Section 549 of the Railway Mail Pay Act of 1916 (p. 78, appendix) authorizes the Commission to classify carriers and apply general rates to all carriers in the same class.

Commission's report in this proceeding. (R. 44). There was in all those cases much more than the figures showing mail space ratios, amount of unused space, etc.

The Georgia & Florida has argued that the rates of pay accorded other railroads in other mail pay proceedings have no bearing upon the question of the reasonableness of its rates. With this appellants agree. Those proceedings, as well as this, were decided by the Commission solely upon their respective records. The ratios of mail space to total passenger space and the other space relations in other proceedings were derived from data compiled in special studies and have no relevancy here. While the Commission's report in this case cites a number of other proceedings, this was only to show that in such proceedings consideration was given to other factors as well as the results of the cost studies.

(2) Comparisons with other services

The lower court held immaterial what it stated to be "The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical conditions, at a profit." (R. 56) The report of Division 5 made some reference to rates paid railroads other than applicant. The report of the entire Commission, however, on rehearing made no such reference, but confined its analysis to the evidence of operations by applicant only. What

the Commission said in the second report was (R. 49):

> The foregoing computations are derived solely from the space and revenue studies. They show that in relation to the other services the department pays a considerably greater amount per car-foot mile of service than the carrier receives from other services rendered in the same trains.

If we look at the figure 0.6573, showing the computed expense per car-foot mile incurred in operating the passenger train service as a whole, without regard to the slightly lower figure showing expense per car-foot mile incurred in operating the mail authorized space plus a part of the unused space, we see that in comparison with the first figure, the Department paid 1.0297 cents for every car-foot mile of service it asked for and received. It is only when that revenue is diluted by spreading it over not only the authorized space but over a large additional amount of space not used by mail, including a share of space hereinbefore shown to have been operated solely for the carrier's convenience, that the revenue per car-foot mile from mail is computed as being less than the expense per car-foot mile. But even on the basis of so diluting the revenue per car-foot mile, we see that the mail revenue per car-foot mile was 5.75 mills as compared with a similar revenue basis from express of 2.36 mills and from passenger proper of

6.94 mills. We further see that the mail revenue of $35,728 for the year 1931 was obtained from 12.96 percent of the total space, including as before the same portion of the unused space, as compared with similar figures of $36,322 for passenger proper from 80.35 percent and $7,593 from express from 6.69 percent.

Obviously comparisons of revenues the carrier receives from other services in the same trains, as to which it is free to initiate its own rates, subject, of course, to requirements of law that such rates shall be just and reasonable, and governed necessarily by competitive conditions, afford a means which the Commission is not prohibited from employing in discharge of its duty to determine what are the fair and reasonable rates for the carriage of the mails. And that is especially true when the Commission does not employ such comparisons as the sole test but merely as a part of the entire fabric of evidence presented to it.

(3) No inconsistency in the Commission's findings

We can quickly show that there was no inconsistent finding of fact by the Commission in the two reports. Its ultimate conclusion in the first report, 192 I. C. C. 779, 783, reads:

> We find that the rates of pay now received by applicant for the transportation of mail, established in *Railway Mail Pay*, 144 I. C. C. 675, for railroads over 100 miles in length,

> are fair and reasonable. The application for increased compensation is denied.
>
> An appropriate order will be entered.
>
> (R. 10)

In the supplemental report, here under review, the Commission found (214 I. C. C. 66, 76):

> Giving consideration to all the computations, the extent and cause of the operation of a substantial portion of the unused space, the fact that a theoretical cost and not actual cost is derived from the methods and plans adopted, and the small amount of mail carried in the authorized units of service, we find upon this augmented record that the present rates for transportation of the mail by the applicant are fair and reasonable.
>
> (R. 50)

These findings are consistent.

If the fact were otherwise, however, it would be without legal significance. *Manufacturers' Ry. Co.* v. *U. S.*, 246 U. S. 457, 482. It is true that, with the lower court's first opinion before it, the Commission felt obliged in its report on further hearing to explain the reasons for its action in considerable detail. This precaution would seem to be well taken in view of the Court's recent decisions holding Commission orders invalid for failure to state reasons fully for its action and to make essential findings. (Cf. *United States* v. *Chicago, M., St. P. & P. Ry. Co.*, 294 U. S. 499).

(4) The court's earlier decision did not establish the law of the case

In its first opinion, the District Court, in annulling the order, directed the Commission to "take such further action in the premises as the law requires" (R. 30), without specifying in any way what the law required. Obeying its mandate, the Commission reopened the proceeding and held further hearings. The decision upon the reopened proceedings, by the entire Commission, based on the augmented record, affirmed the conclusion of Division 5, based on a different record. Now the lower court holds, erroneously, we think, that its earlier decision "unreversed," established the law of the case. (R. 57)

In *Atlanta, B. & C. Ry. Co.* v. *United States,* 28 F. (2d) 885, a three-judge District Court enjoined the enforcement of a Commission order prescribing certain accounting regulations to be followed by the carrier, and directed that the case "stand for further hearing before the Commission." After granting the further hearing the Commission prescribed the same accounting rules the court had theretofore condemned (185 I. C. C. 6). A further suit was filed by the carrier to enjoin the Commission's decision, and the District Court again entered an order granting the relief sought. (37 F. (2d) 401). On appeal, this Court held the decision of the Commission was not an order such as is contemplated by the Urgent Deficiencies Act, (282 U. S. 522) and in that decision overruled the

contention of *res judicata*. The question was again considered by the Commission, and in 201 I. C. C. 645 it entered an order which imposed upon the carrier the identical accounting rule required by its two prior decisions. This time both the District Court and this Court sustained the Commission's order. (See *Atlanta, B. & C. R. Co.* v. *United States*, 296 U. S. 33).

CONCLUSION

The decision of the District Court should be reversed, the injunctions ordered dissolved, and the petition and supplemental petition dismissed.

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OCTOBER 1937.

APPENDIX

The Railway Mail Pay Service Act of July 28, 1916, as amended, Title 39, U. S. Code, Sections 523 et seq., provides:

§ 523. *Carrying on trains without extra charge persons in charge of.* Every railroad company carrying the mails shall carry on any train it operates and without extra charge therefor the persons in charge of the mails and when on duty and traveling to and from duty, and all duly accredited agents and officers of the Post Office Department and the Railway Mail Service and post-office inspectors while traveling on official business, upon the exhibition of their credentials. (July 28, 1916, c. 261, § 1, 39 Stat. 419.)

§ 524. *Conditions of railway service; adjustment of compensation.* The Postmaster General is authorized and directed to adjust the compensation to be paid to railroad companies for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided. (July 28, 1916, c. 261, § 5, 39 Stat. 425.)

§ 525. *Classes of routes enumerated.* The Postmaster General may state railroad mail routes and authorize mail service thereon of the following four classes, namely: Full railway post-office car service, apartment railway post-office car service, storage-car service, and closed-pouch service. (July 28, 1916, c. 261, § 5, 39 Stat. 425.)

§ 526. *Full railway post-office car service.* Full railway post-office car mail service shall be service by cars forty feet or more in length, constructed, fitted up, and maintained for the distribution of mails on trains. The authorizations of full railway post-office cars shall be for standard-sized cars sixty feet in length, inside measurement, except as hereinafter provided. (July 28, 1916, c. 261, § 5, 39 Stat. 425.)

§ 527. *Apartment railway post-office car service.* Apartment railway post-office car mail service shall be service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains. Two standard sizes of apartment railway post-office cars may be authorized and paid for, namely, apartments fifteen feet and thirty feet in length, inside measurement, except as hereinafter provided. (July 28, 1916, c. 261, § 5, 39 Stat. 425.)

§ 528. *Storage-car service.* Storage-car mail service shall be service by cars used for the storage and carriage of mails in transit other than by full and apartment railway post-office cars. The authorizations for storage cars shall be for cars sixty feet in length, inside measurement, except as hereinafter provided. Storage space in units of three feet, seven feet, fifteen feet, and thirty feet, both sides of car, may be authorized in baggage cars at not exceeding pro rata of the rates hereinafter named for sixty-foot storage cars. (July 28, 1916, c. 261, § 5, 39 Stat. 425.)

§ 529. *Service by full and apartment railway post-office cars and storage cars.* Service by full and apartment railway post-office cars and storage cars shall include the car-

riage therein of all mail matter, equipment, and supplies for the mail service and the employees of the Postal Service or Post Office Department, as shall be directed by the Postmaster General to be so carried. (July 28, 1916, c. 261, § 5, 39 Stat. 426.)

§ 530. *Closed-pouch service.* Closed-pouch mail service shall be the transportation and handling by railroad employees of mails on trains on which full or apartment railway post-office cars are not authorized, except as hereinbefore provided. The authorizations for closed-pouch service shall be for units of seven feet and three feet in length, both sides of car. (July 28, 1916, c. 261, § 5, 39 Stat. 426.)

§ 531. *Rates of payment for classes of routes.* The rates of payment for the services authorized in accordance with this section shall be as follows, namely:

(a) *Full railway post-office car service.* For full railway post-office car mail service at not exceeding 21 cents for each mile of service by a sixty-foot car.

In addition thereto he may allow not exceeding $4.25 as a combined initial and terminal rate for each one-way trip of a sixty-foot car.

(b) *Apartment railway post-office car service.* For apartment railway post-office car mail service at not exceeding 11 cents for each mile of service by a thirty-foot apartment car and 6 cents for each mile of service by a fifteen-foot apartment car.

In addition thereto he may allow not exceeding $2.75 as a combined initial and terminal rate for each one-way trip of a thirty-foot apartment car and $2 as a combined initial and terminal rate for each one-way trip of a fifteen-foot apartment car.

(c) *Storage-car service.* For storage-car mail service at not exceeding 21 cents for each mile of service by a sixty-foot car.

In addition thereto he may allow not exceeding $4.25 as a combined initial and terminal rate for each one-way trip of a sixty-foot car.

(d) *Closed-pouch service.* For closed-pouch service, at not exceeding 1½ cents for each mile of service when a three-foot unit is authorized, and 3 cents for each mile of service when a seven-foot unit is authorized.

In addition thereto he may allow not exceeding 25 cents as the combined initial and terminal rate for each one-way trip of a three-foot unit of service and 50 cents as a combined initial and terminal rate for each one-way trip of a seven-foot unit of service. (July 28, 1916, c. 261, § 5, 39 Stat. 426.)

§ 532. *Cars of less than standard lengths; cars of excess length.* Where authorizations are made for cars of the standard lengths of sixty, thirty, and fifteen feet, as provided by sections 526 and 527 of this title, and the railroad company is unable to furnish such cars of the length authorized, but furnishes cars of lesser length than those authorized, but which are determined by the department to be sufficient for the service, the Postmaster General may accept the same and pay only for the actual space furnished and used, the compensation to be not exceeding pro rata of that provided by section 531 of this title for the standard length so authorized. The Postmaster General may accept cars and apartments of greater length than those of the standard requested, but no compensation shall be allowed for such excess lengths. (July 28, 1916, c. 261, § 5, 39 Stat. 426.)

§ 533. *Initial and terminal rates to cover certain expenses; varying allowances for full railway post-office cars, apartment railway post-office cars, and storage cars.* The initial and terminal rates provided for in section 531 of this title shall cover expenses of loading and unloading mails, switching, lighting, heating, cleaning mail cars, and all other expenses incidental to station service, and required by the Postmaster General in connection with the mails that are not included in the car-mile rate. The allowance for full railway post-office cars, apartment railway post-office cars, and storage cars may be varied in accordance with the approximate difference in their respective cost of construction and maintenance. (July 28, 1916, c. 261, § 5, 39 Stat. 426.)

§ 534. *Computation of car-miles; railway post-office cars and apartment railway post-office cars.* In computing the car-miles of the full railway post-office cars and apartment railway post-office cars, the maximum space authorized in either direction of a round-trip car run shall be regarded as the space to be computed in both directions, unless otherwise mutually agreed upon. (July 28, 1916, c. 261, § 5, 39 Stat. 427.)

See section 542 of this title.

§ 535. *Same; storage cars.* In computing the car-miles of storage cars, the maximum space authorized in either direction of a round-trip car run shall be regarded as the space to be computed in both directions, unless the car to be used by the company in the return movement, or otherwise mutually agreed upon. (July 28, 1916, c. 261, § 5, 39 Stat. 427.)

See section 542 of this title.

§ 536. *Land-grant roads.* Railroad companies whose railroads were constructed in

whole or in part by a land grant made by Congress, on the condition that the mails should be transported over their roads at such price as Congress should by law direct, shall receive only 80 per centum of the compensation otherwise authorized by this chapter. (July 28, 1916, c. 261, § 5, 39 Stat. 426.)

§ 537. *Style, construction, and maintenance of post-office cars; pay for unsound cars; steel cars.* All cars or parts of cars used for the Railway Mail Service shall be of such construction, style, length, and character, and furnished in such manner as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated, lighted, and cleaned by and at the expense of the railroad companies. No pay shall be allowed for service by any railway post-office car which is not sound in material and construction and which is not equipped with sanitary drinking-water containers and toilet facilities, nor unless such car is regularly and thoroughly cleaned. The Postmaster General shall not approve or allow to be used, or pay for service by, any full railway post-office car not constructed of steel or steel underframe or equally indestructible material; and all full railway post-office cars accepted for this service and contracted for by the railroad companies shall be constructed of steel. (July 28, 1916, c. 261, § 5, 39 Stat. 427.)

§ 538. *Facilities for carrying and handling mails; cars at station; station room, offices for employees.* Railroad companies carrying the mails shall furnish all necessary facilities for caring for and handling them while in their custody. They shall furnish all cars or parts of cars used in the trans-

portation and distribution of the mails, except as herein otherwise provided, and place them in stations before the departure of trains at such times and when required to do so. They shall provide station space and rooms for handling, storing, and transfer of mails in transit, including the separation thereof, by packages for connecting lines, and such distribution of registered mail in transit as may be necessary, and for offices for the employees of the Railway Mail Service engaged in such station work when required by the Postmaster General, in which mail from station boxes may be distributed if it does not require additional space. (July 28, 1916, c. 261, § 5, 39 Stat. 427.)

§ 539. *Selection of trains; carrying on any train.* The Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed. Every railroad company carrying the mails shall carry on any train it operates, and with due speed, all mailable matter, equipment, and supplies directed to be carried thereon. If any such railroad company shall fail or refuse to transport the mails, equipment, and supplies when required by the Postmaster General on any train or trains it operates, such company shall be fined such reasonable amount as may, in the discretion of the Postmaster General, be deemed proper. (July 28, 1916, c. 261, § 5, 39 Stat. 428.)

§ 540. *Service operated by railroad and steamboats.* The provisions of sections 524 to 568 of this title shall apply to service operated by railroad companies partly by railroad and partly by steamboats. (July 28, 1916, c. 261, § 5, 39 Stat. 428.)

§ 541. *Transportation required in manner, under conditions, and with service prescribed by Postmaster General; compensa-*

tion therefor. All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith. (July 28, 1916, c. 261, § 5, 39 Stat. 429.)

§ 541a. *Transportation by motor vehicle.* The Postmaster General is hereby authorized, in his discretion, to permit railroad and electric-car companies to provide mail transportation by motor vehicle over highways in lieu of service by train, the compensation for such service to be at a rate not in excess of the rate that would be allowed for similar service by railroad or electric car, payment therefor to be made from the appropriate appropriation for railroad transportation and mail messenger service or electric and cable-car service. (Feb. 15, 1933, c. 75, 47 Stat. 809.)

§ 542. *Interstate Commerce Commission to fix and determine rates and compensation.* The Interstate Commerce Commission is hereby empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing. (July 28, 1916, c. 261, § 5, 39 Stat. 429.)

§ 543. *Relation between the railroads as public-service corporations and the Government to be considered.* In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public-service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads. (July 28, 1916, c. 261, § 5, 39 Stat. 429.)

§ 544. *Procedure for ascertaining rates.* The procedure for the ascertainment of said rates and compensation shall be as provided in sections 545 to 554 of this title. (July 28, 1916, c. 261, § 5, 39 Stat. 429.)

§ 545. *Filing of statement by Postmaster General with Interstate Commerce Commission showing transportation required.* The Postmaster General shall file with the commission a statement showing the transportation required of all railway common carriers, including the number, equipment, size, and construction of the cars necessary for the transaction of the business; the character and speed of the trains which are to carry the various kinds of mail; the service, both terminal and en route, which the carriers are to render; and all other information which may be material to the inquiry, but such other information may be filed at any time in the discretion of the commission. (July 28, 1916, c. 261, § 5, 39 Stat. 429.)

§ 546. *Employment of clerical assistance; plan for transportation filed with Interstate Commerce Commission.* The Postmaster General may employ such clerical and other assistance as shall be necessary to carry out

the provisions of sections 524 to 568 of this title, and may rent quarters in Washington, District of Columbia, if necessary, for the clerical force engaged thereon, and pay for the same out of the appropriation for inland transportation by railroad routes. The Postmaster General shall file with the Commission a comprehensive plan for the transportation of the mails on said railways and shall embody therein what he believes to be the reasonable rate or compensation the said railway carriers should receive. (July 28, 1916, c. 261, § 5, 39 Stat. 430.)

§ 547. *Notice by Interstate Commerce Commission to railroads; answer of railroads; hearings.* Thereupon the commission shall give notice of not less than thirty days to each carrier so required to transport mail and render service, and upon a day to be fixed by the commission, not later than thirty days after the expiration of the notice herein required, each of said carriers shall make answer and the commission shall proceed with the hearing as provided by law for other hearings between carriers and shippers or associations. (July 28, 1916, c. 261, § 5, 39 Stat. 430.)

§ 548. *Taking testimony, evidence, penalties, and procedure.* All the provisions of the law for taking testimony, securing evidence, penalties, and procedure are hereby made applicable. (July 28, 1916, c. 261, § 5, 39 Stat. 430.)

§ 549. *Classification of carriers by Interstate Commerce Commission.* For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classi-

fication. (July 28, 1916, c. 261, § 5, 39 Stat. 430.)

§ 550. *Additional weighing of mails.* Pending such hearings, and the final determination of the question, if the Interstate Commerce Commission shall determine that it is necessary or advisable, in order to carry out the provisions of this chapter, to have additional and more frequent weighing of the mails for statistical purposes, the Postmaster General, upon request of the commission, shall provide therefor in the manner prescribed by law, but such weighing need not be for more than thirty days. (July 28, 1916, c. 261, § 5, 39 Stat. 430.)

§ 551. *Orders of Interstate Commerce Commission establishing rate or compensation.* At the conclusion of the hearing the commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation for inland transportation by railroad routes such rate or compensation. (July 28, 1916, c. 261, § 5, 39 Stat. 430.)

§ 552. *Percentage of rates allowed land-grant railroads.* The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct only 80 per centum of the compensation paid other railroads for transporting the mails and all service by the railroads in connection

therewith. (July 28, 1916, c. 261, § 5, 39 Stat. 430.)

§ 553. *Applications for reexaminations.* Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein. (July 28, 1916, c. 261, § 5, 39 Stat. 430.)

§ 554. *Powers conferred on Interstate Commerce Commission.* For the purposes of sections 524 to 568 of this title the Interstate Commerce Commission is hereby vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers. (July 28, 1916, c. 261, § 5, 39 Stat. 430.)

§ 555. *Conveyance under special arrangements in freight trains; rates.* The provisions of sections 524 to 568 of this title respecting the rates of compensation shall not apply to mails conveyed under special arrangement in freight trains, for which rates not exceeding the usual and just freight rates may be paid, in accordance with the classifications and tariffs approved by the Interstate Commerce Commission. (July 28, 1916, c. 261, § 5, 39 Stat. 428.)

§ 556. *Proof of performance of service.* Railroad companies carrying the mails shall submit, under oath when and in such form as may be required by the Postmaster General, evidence as to the performance of service. (July 28, 1916, c. 261, § 5, 39 Stat. 428.)

§ 557. *Information from Interstate Commerce Commission as to revenues from express companies; rates for transporting matter other than first class.* The Postmaster General shall, from time to time, request information from the Interstate Commerce Commission as to the revenue received by railroad companies from express companies for services rendered in the transportation of express matter, and may, in his discretion, arrange for the transportation of mail matter other than of the first class at rates not exceeding those so ascertained and reported to him, and it shall be the duty of the railroad companies to carry such mail matter at such rates fixed by the Postmaster General. (July 28, 1916, c. 261, § 5, 39 Stat. 428.)

§ 558. *Determination by Interstate Commerce Commission of postal carload or less rate for transportation of fourth-class matter and periodicals.* The Postmaster General may, in his discretion, petition the Interstate Commerce Commission for the determination of a postal carload or less-than-carload rate for transportation of mail matter of the fourth class and periodicals, and may provide for and authorize such transportation, when practicable, at such rates, and it shall be the duty of the railroad companies to provide and perform such service at such rates and on the conditions prescribed by the Postmaster General. (July 28, 1916, c. 261, § 5, 39 Stat. 428.)

§ 559. *Distinguishing between several classes of matter.* The Postmaster General may, in his discretion, distinguish between the several classes of mail matter and provide for less frequent dispatches of mail matter of the third and fourth classes and

periodicals when lower rates for transportation or other economies may be secured thereby without material detriment to the service: (July 28, 1916, c. 261, § 5, 39 Stat. 428.)

§ 560. *Return to mails, postal cards, stamped envelopes and newspaper wrappers.* The Postmaster General may return to the mails, when practicable for the utilization of car space paid for and not needed for the mails, postal cards, stamped envelopes, newspaper wrappers, empty mail bags, furniture, equipment, and other supplies for the Postal Service. (July 28, 1916, c. 261, § 5, 39 Stat. 429.)

§ 561. *Same; empty mail bags.* The Postmaster General, in cases of emergency between October 1 and April 1 of any year, may return to the mails empty mail bags and other equipment theretofore withdrawn therefrom as required by law, and, where such return requires additional authorization of car space, pay for the transportation thereof as provided for herein out of the appropriation for inland transportation by railroad routes. (July 28, 1916, c. 261, § 5, 39 Stat. 429.)

§ 562. *Weighing mail; computations.* The Postmaster General may have the weights of mail taken on railroad mail routes, and computations of the average loads of the several classes of cars and other computations for statistical and administrative purposes made at such times as he may elect, and pay the expense thereof out of the appropriation for inland transportation by railroad routes. (July 28, 1916, c. 261, § 5, 39 Stat. 429.)

§ 563. *Refusal to perform service at rates or methods of compensation provided by law.*

It shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined $1,000. Each day of refusal shall constitute a separate offense. (July 28, 1916, c. 261, § 5, 39 Stat. 431.)

§ 564. *New and additional service; reduction or discontinuance of service.* New service and additional service may be authorized at not exceeding the rates herein provided, and service may be reduced or discontinued with pro rata reductions in pay, as the needs of the Postal Service may require. No additional pay shall be allowed for additional service unless specifically authorized by the Postmaster General (July 28, 1916, c. 261, § 5, 39 Stat. 427.)

§ 565. *Special contracts for transportation; reports of.* The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those herein specified, and make report to Congress of all cases where such special contracts are made and the terms and reasons therefor. (July 28, 1916, c. 261, § 5, 39 Stat. 427.)

§ 566. *Service over property owned by another company; over land-grant companies.* Service over property owned or controlled by another company or a terminal company shall be considered service of the railroad company using such property and not that of the other or terminal company. Service over land-grant road shall be paid for as herein provided. (July 28, 1916, c. 261, § 5, 39 Stat. 427.)

§ 567. *Failure to furnish cars or compartments.* If any railroad company carrying the mails shall fail or refuse to provide cars or apartments in cars for distribution purposes when required by the Postmaster General, or shall fail or refuse to construct, fit up, maintain, heat, light, and clean such cars and provide such appliances for use in case of accident as may be required by the Postmaster General, it shall be fined such reasonable sum as may, in the discretion of the Postmaster General, be deemed proper. (July 28, 1916, c. 261, § 5, 39 Stat. 428.)

§ 568. *Deductions from pay for reduction in or nonperformance of service.* The Postmaster General may make deductions from the pay of railroad companies carrying the mails under the provisions of sections 524 to 568 of this title for reduction in service or infrequency of service where, in his judgment, the importance of the facilities withdrawn or reduced requires it, and impose fines upon them for delinquencies. He may deduct the price of the value of the service in cases where it is not performed, and not exceeding three times its value if the failure be occasioned by the fault of the railroad company. (July 28, 1916, c. 261, § 5, 39 Stat. 428.)

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